UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	No. C70-9213
	)	Subproceeding 01-1
v.	)	Subproceeding 91-1
	)	
STATE Of WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

CLOSING ARGUMENTS

BEFORE THE HONORABLE RICARDO S. MARTINEZ

June 7, 2010

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THE CLERK: This is the matter of the United States, et al versus the State of Washington, case number C70-9213, assigned to this Court. Will counsel please make their appearances for the record.

THE COURT: Who is going to start? Mr. Sledd.

MR. SLEDD: May it please the Court. John Sledd for the Sauk-Suiattle, Stillaguamish, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Clallam and Hoh Tribes.

MR. MONSON: Good afternoon, your Honor. Peter Monson for the United States.

MR. STAY: Good afternoon, your Honor. Alan Stay for just the Muckleshoot Indian Tribe.

THE COURT: Thank you.

MS. FOSTER: Good afternoon, your Honor. Alix Foster for the Swinomish Indian Tribal Community.

MR. RAAS: Good afternoon, your Honor. Dan Raas for the Lummi Nation.

MS. RASMUSSEN: Good afternoon. Lauren Rasmussen, co-counsel for the Port Gamble S'Klallam and the Jamestown S'Klallam Tribes.

MR. MORISSET: May it please the Court, Mason Morisset for the Tulalip Tribes.

MR. HOLLOWED: May it please the Court, my name is John Hollowed with the Northwest Indian Fisheries Commission.

MR. STILTNER: Your Honor, I am Sam Stiltner, attorney for the Puyallup Tribe.

MR. ZEILMAN: Tom Zeilman, attorney for the Yakima Nation.

MR. ARNETT: Howard Arnett for the Warm Springs Tribe of Oregon.

MR. REICH: Richard Reich for the Muckleshoot Tribe.

MR. LEWIS: Good afternoon. Yale Lewis, co-counsel for the Quileute Tribe.

MS. KRUEGER: Katherine Krueger, co-counsel for the Quileute Tribe.

MS. HANSEN: Michelle Hansen for the Suquamish Tribe.

MS. NEIL: Mary Neil, attorney for the Lummi Nation.

MR. GRUBER: Brian Gruber for the Makah Tribe.

MR. LYON: Kevin Lyon for the Squaxin Island Tribe.

MS. MARTIN: Connie Sue Martin for the Nooksack Tribe.

MR. SUUGEE: Steve Suugee, Lower Elwha Clallam Tribe.

MS. HOVET: Regina Hovet, Squaxin Island Tribe.

THE COURT: Anyone else from the tribes?

MR. TOBIN: Bill Tobin for the Nisqually Tribe.

MR. CUSHMAN: Chris Cushman for the Nisqually Tribe.

MS. WILLIAMS: Sheri Williams for the Lummi Nation.

THE COURT: All right.

MR. TOMISSER: Rene Tomisser on behalf of the State of Washington.

MS. WOODS: Good afternoon, your Honor. I'm Fronda Woods for the State of Washington.

MR. SHAFTEL: Doug Shaftel with the State of Washington.

MR. FERESTER: Phil Ferester, Assistant Attorney General for the State of Washington.

THE COURT: Thank you, all. The Court has had an opportunity to fully review the materials submitted, the post-trial briefing, the proposed Findings of Fact and Conclusions of Law, and has set aside this afternoon to allow the parties an opportunity to try to convince me in oral argument as to why I should adopt those proposed Findings of Fact and Conclusions of Law.

Mr. Sledd, I understand you will be arguing on the tribes' behalf; is that correct?

MR. SLEDD: I will.

UNIDENTIFIED ATTORNEY: Your Honor, before the argument starts, I wanted to announce that our good friend and colleague and officer of the court, Timothy Roy Weaver, died March 22nd, 2010, at the age of 65, after a long, 18-year battle with cancer. He was one of the few among us who remembers, almost from the very beginning, the early years of this case. And he will be missed by everybody.

THE COURT: I'm sure he will. Thank you.

MR. SLEDD: May it please the Court, John Sledd on behalf of the ten tribes I named earlier. I will be arguing on

behalf of all the plaintiff tribes, your Honor.

I understand the Court has set aside an hour for each side. I am hoping in some prepared remarks and response to questions, if the Court has any, to go for about a half hour. Mr. Monson, for the United States, would like to have about five to ten minutes, and then the plaintiffs would like to reserve the remainder of their time for rebuttal, if they may.

Your Honor, I want to take this opportunity to address four critical points that were established in the trial that show the need for and the propriety of the injunction that the plaintiffs have presented to the Court.

First is that fixing state culverts and keeping them fixed will significantly improve THE tribal salmon harvest.

Second, that accelerating correction of state barrier culverts is essential to vindicate treaty rights and to recover salmon rights.

Third, the injunction the plaintiffs have proposed will trigger no state budget crisis.

And, fourth, that the injunction, by providing some basic ground rules for the correction of culverts, will avoid future disputes between the parties, while preserving the state's discretion on how to fix those culverts.

There are, given the time limits, a number of issues I do not intend to address. One of those is the state's motion for reconsideration of your Honor's summary judgment decision. The

issues that were raised at summary judgment of what the treaty imposes by way of duties and whether the state has violated those was thoroughly briefed, it was thoroughly argued, it was decided. The purpose of the recent trial was to go beyond that and decide a remedy. And that is what I want to address.

The first point I want to make from the evidence at trial, your Honor, is the proof of irreparable harm to tribal fisheries which the proposed injunction will resolve.

The Court's summary judgment decision found that culverts contribute significantly to a substantial diminishment of tribal harvest. And the evidence at trial confirmed that. It showed an unrelenting decline in salmon populations and harvests since the beginning of the 20th century. It showed that tribal harvest which started to grow after the Boldt decision reached a peak and is now also in unrelenting decline. It has fallen back to the abysmal levels that prompted the filing of U.S. v. Washington in the first place.

The affects of the shortage of salmon on the tribes was made clear in the testimony of four tribal members, and an additional tribal biologist, from throughout the case area, who testified that their fisheries have been circumscribed in time and in place, that they are no longer able to make a livelihood from their fishing, and that they are compelled to celebrate their first salmon ceremony by drawing fish from a freezer rather than from the streams in their own homelands.

The contribution of state barrier culverts to this situation is clear. This fall, as nine years ago when this case was filed, and as three years ago when your Honor issued a summary judgment decision -- There we go. This is what salmon will find this fall, your Honor, when they return to the waters of the case area, over 1100 state barrier culverts in every basin throughout the base area that block their passage to the habitat they need to reproduce.

The Department of Fish and Wildlife's biologist, Brian Benson, testified upstream of just 800 of those barrier culverts there lie almost five million square meters of habitat, and almost a thousand miles of stream.

Tyson Waldo, a biologist with the Northwest Fisheries Commission, who testified for the plaintiffs, said that there is an additional 200 miles blocked by DNR culverts.

The consequences of losing 1200 miles of salmon stream are not speculative, they are not hypothetical. They follow from a very simple principle that was set out by Mr. Wasserman, the biologist for the Swinomish Tribe, in his testimony. He said, "The number of fish available for harvest and spawning is, in large measure, dependent upon having access to sufficient fresh water habitat to maximize the number of smolts." Whereas your Honor put it in a question he asked to another witness, Dr. Jeff Koenings: "It all starts with the habitat, doesn't it?"

No testimony from any practicing biologist at trial was to

the contrary, and the entire state culvert correction program is predicated on the truth of that principle.

The state, in the face of this evidence, nevertheless, contends that plaintiffs have not proven any irreparable harm. The state would demand a precise tribe by tribe, culvert by culvert accounting of loss. But that is impossible. The state's witness, Mr. Barber, another biologist, testified it is not possible to tell how many fish are cost by one culvert because the biology is too complicated. Just because the harm cannot be specifically quantified does not mean that no irreparable harm exists. Mr. Barber continued and said, "It is not necessary to know the actual number of fish increase to know what you are doing has benefit to fish."

And, moreover, as Mr. Rawson, the biologist for the Tulalip Tribe, testified, "It is possible to determine not just the existence, but the magnitude of harm to the fisheries, and the benefit from correcting culverts by looking at the amount of habitat."

Dr. Sekulich, the state witness and former WDFW employee, went a step further. He said he could think of no better way to quantify the potential production that is lost to these culverts than to multiply the habitat area times the production value per meter squared. That is why he used that methodology in his priority index; it's why he used it in his effort in Exhibit AT-104, where he calculated that every linear meter of habitat

loss cost half a salmon, which translate to about 750 a mile. And that's why he used that habitat surrogate times a production value in the 1997 Fish Passage Inventory Final Report where he told the legislature that the potential production upstream of DOT barrier culverts was 200,000 adult salmonids a year.

Using habitat area as a surrogate for the numbers of lost fish is not a novelty. It has been approved in the ESA incidental take context, if the biology makes it impossible to calculate the precise numbers of fish taken. For that proposition, your Honor, there is a case, Northwest Environmental Defense Center versus National Marine Fisheries Service from the District of Oregon, decided about six or eight weeks before trial began in this case.

And the state did something similar in the Gillette case, which we cited in our motion in limine papers prior to trial, where the state proved the loss of adult salmon from illegal stream bulldozing by multiplying an estimated number of reds in a given length of stream and calculating an estimated number of adults that could come back from that. And when that methodology in Gillette was challenged as too speculative, the State Court of Appeals said, "The court should not immunize a defendant once damage has been shown merely because the extent or amount thereof cannot be ascertained with mathematical precision."

The state goes on to argue that proof should be made of tribe-by-tribe harm before we can obtain an injunction case

area-wide. That raises the wrong question, your Honor. The relevant question is not whether every tribe is harmed, but whether barriers in all parts of the case areas harm at least one of the plaintiffs' tribes. If they do, then they are subject to injunction. As Mr. Waldo's map and his table of lost habitat showed at trial, every basin in the case area has barrier culverts and every one has habitat blocked by state barrier culverts.

The decisions of this Court in U.S. v. Washington makes equally clear that there is a tribal fishing area in every single part of the case area.

And, moreover, the fish that originate from one barrier culvert don't just impair harvest in that particular basin. Wherever those fish go -- would go, there are fewer of them to be caught, affecting the harvest of tribes throughout the case area. They can even affect the harvest from completely unrelated basins by forcing tribes to ratchet down their catch in so-called mixed stock fisheries. Case area-wide relief is thus completely justified.

In addition to demanding a biologically impossible specificity in the proof of harm, the state suggests that fixing its barriers will not help salmon or tribal harvest because there are other barriers on the same streams. But the state offers no legal support for the notion that equity should condone their violations because there are other barriers out there which

violate state law and which the state has chosen to allow to remain. Nor does the evidence show that those non-state barriers would make an injunction against the state barriers ineffective. The key evidence for that proposition, your Honor, is a series of tables that were done by Mr. Benson and were worked on by Mr. Waldo, that analyzed 315 WSDOT culverts where there has been a complete enough habitat survey to actually locate the barriers upstream and downstream.

I would refer the Court to Exhibits AG-285, AG-288 and W-133. What those exhibits show is that for those 315 culverts, more than half of them have no downstream barriers, and 80 percent of them have at most one downstream barrier.

Moreover, those barriers are highly concentrated in certain basins. Fully ten percent of the barriers upstream of those 315 DOT culverts are on a single drainage, Little Bear Creek, near Bothell. Not coincidentally, that is the Little Bear Creek which state counsel directed Mr. Benson to testify about. It is an outlier.

Many of these non-state barriers are also only partial barriers. Again, Mr. Benson looked at this, he found that 70 percent of the barriers below those 315 DOT culverts are only partial. In those, 70 percent of the time, that means that there are fish still getting past -- some fish who would still benefit by removal of that DOT culvert upstream.

The evidence also shows those non-state barriers are coming

out. The state's tenth anniversary report on the Salmon Recovery Act, which is Exhibit 085(e), the state exhibit, shows that more than 3,500 barriers have been removed statewide since 1999. If you subtract out the number of fixes by the state, which is in the record, you are left with a conclusion that 2,500 of these other barriers have come out in the past ten years. They are coming out.

If the state is, nonetheless, concerned about how non-state barriers will affect its corrections in the future, it is free under the proposed injunction to prioritize correction in basins that have fewer of those non-state barriers. The state could even choose under the injunction to completely defer correction of some DOT barriers that have a lot of non-state barriers associated to the end of the DOT culverts' useful life, as long as by doing that they don't go over ten percent of the total amount of habitat that is deferred.

In summary, regarding proof of irreparable harm, your Honor, the plaintiffs clearly proved it, and they proved an injunction would effectively remedy it, and would restore the fish that these culverts have been taking out of these streams for decades.

Turning to my second point, your Honor. The evidence showed that an injunction accelerating DOT culvert corrections would vindicate the treaties, it is essential to do so, and it is essential to recovering the salmon.

As the Department of Fish and Wildlife and the Department of

Transportation stated in a pair of reports to the legislature in 1997, "The rate of barrier correction must be accelerated if Washington's wild salmon and trout stocks are to recover." Mr. Benson testified at trial that is still true. The rate still needs to be accelerated. And it is easy to see why. The state's correction rate, if it continues, will perpetuate harms to the fish and the fisheries for decades.

Let's put aside the Parks and Recreation Commission, which hasn't even finished its inventory and has fixed just one culvert. Put aside the handful of culverts fixed and the relatively small number that DFW has. Put aside even DNR, despite the fact that Mr. Nagygyor testified for them that they will have trouble meeting their 2016 goal statewide, because they have a $50 million shortfall in their access road fund they use to pay for these corrections. Focus just on DOT, and focus just on the 800 culverts that have more than 200 meters of habitat.

The Department of Transportation in their annual reports tells us how many they have fixed. If you look at the most recent one that was in evidence, it will show you that there have been 176 successful DOT culvert corrections statewide since 1991. 176. Two-thirds of those have been in the case area. And that translates to about six and a half corrections per year. And if you do the math on 800 DOT pipes, at six and a half a year, it will take 123 years just to fix those 800.

This Court in another subproceeding in U.S. v. Washington

many years ago said that the presumption is that the tribes are entitled to enforcement of their treaty rights without delay. And the plaintiffs submit, your Honor, 123 years of further delay is completely inconsistent with that presumption, and with their treaty rights.

I would point out, your Honor, if the state is correct in its own cost estimates, in its own funding predictions of about $15 million a year, that situation is actually worse. You do the math there. They are only going to be able to fix about four or four and a half culverts a year. And we are looking at close to two centuries to solve this problem.

Now, despite the evidence of the abysmal pace of correction currently, at trial and in its post-trial briefing, the state has argued that accelerating culvert corrections will actually hurt salmon recovery. The only support for their claims is the former biologist, Dr. Jeffrey Koenings. He has claimed that the state has comprehensive, bottom up, integrated, federally approved, holistic plans, prioritized by fingerprinting the limiting factors in each of the watersheds. And he claims that fixing the culverts any faster will upset the apple cart of salmon recovery by taking money from higher priority efforts. Well, that testimony is real long on buzz words, but it is short on substance. The state didn't put any of the salmon recovery plans into evidence so your Honor could see what they do. In fact, there are only two. As Dr. Roni, the United States' witness,

Mr. Wasserman for Swinomish, Mr. Rawson, the Tulalip biologist, all testified, those are Endangered Species Act plans Puget Sound Chinook and Hood Canal summer trout. They are based on ESA recovery standards. Don't put this fish into extinction. They are not based on tribal needs for harvest that were promised at treaty time.

There are no plans for other species in other parts of the case area.

In response to the Court's question, Dr. Koenings actually admitted that his view of -- his vision of integrated, holistic, et cetera, plans, that tie all the four Hs together has not been done on a systematic basis. And not only have the plans that would integrate all these things not been done, but the basic scientific analysis that would be needed to underlie such integrated, prioritized plans has not been done.

Again, Dr. Roni and Mr. Wasserman and Mr. McHenry, the Elwha biologist, testified that in order to prioritize preservation efforts, in the way that Dr. Koenings described as desirable, you have to have detailed watersheds assessments. So look at each species in each basin and identify what is the limiting factor for each species there.

The tribal biologist testified that such assessments exist for only a few basins and a few stocks. The tribal biologists agreed that the limiting factors analysis that the state has done and touted as adequate to this purpose are not. The LSAs, there

is one in evidence, the statewide summary, W-087(h), and it confirms this. It is merely a list of things affecting salmon. It doesn't compare them by species. It doesn't give you a prescription for action by watershed. It characterizes the habitat conditions as good, fair and poor, but it does nothing to (inaudible).

Absent those kinds of integrated plans that would allow you to do that sort of prioritization, what Dr. Roni said, and the other tribal witnesses agreed with, the first thing to do in repairing habitat is to reconnect the broken pieces by pulling out anthropogenic barriers such as culverts. That recommendation was not contradicted by any of the practicing biologists who testified, and it is consistent with multiple exhibits and multiple state reports over the years that agree that barrier culverts must be corrected if wild salmon are to recover.

Somewhat incredibly, Dr. Koenings disagreed with all that evidence and testified that fixing barrier culverts is bad for salmon. And the only thing he based that on was his statement that opening up additional habitat will let wild fish in to interbreed -- hatchery fish in to interbreed with wild fish.

But in response to that concern, your Honor, let me ask a simple question: Where were the wild fish and the hatchery fish before you fixed the barrier? They were all jammed in the remaining habitat downstream, where the competition between them was even more severe. Opening up additional habitat will help

solve that problem.

Dr. Koenings' other argument was not biological, it was financial, that accelerating DOT culvert corrections will take funds away from higher priority efforts. But his analysis is simply wrong. The reason is simple. If you remember the testimony from Victor Moore, the director of the Office of Financial Management who testified on behalf of the state, he made it clear that the cost the Department of Transportation will incur, which is the vast majority of the costs involved in fixing barrier culverts, come out of a separate budget, a transportation budget, that has a separate funding source in the gasoline tax. The costs that pay for salmon recovery are in the general fund budget. That's where the SRF Board is, the Salmon Recovery Board, that's where the Department of Fish and Wildlife is. And ne'er the twain shall meet according to Mr. Moore. Constitutionally, that gas tax revenue cannot be diverted to anything but highway purposes. And as a historic matter, the SRF Board has never made a grant to the DOT to fix a barrier. As far as Mr. Moore's testimony showed, there has never been use of general fund money for Department of Transportation highway construction projects. It simply has not happened and there is no reason to expect it would.

In summary of my second point, your Honor, the evidence at trial was clear, in the absence of an injunction, state barrier culverts will remain on these streams for decades, if not

centuries, they will frustrate both tribal efforts to obtain livelihood and the public interest in salmon recovery.

The third point I want to address, your Honor, is this: The evidence at trial proved that an injunction to correct state barrier culverts will trigger no state budget crisis. The state has argued that spending money to remedy the treaty violation in a timely fashion is a hardship that tips the balance of hardships in its favor and away from the grant of injunctive relief. But the state's costs and budget arguments are simply not logical. Because culverts wear out, and because under state law and existing agreements between agencies like DFW and the Department of Transportation, when they wear out and get replaced they must be made fish passable. The only costs that can properly be attributed to the injunction that the plaintiffs have asked for is the incremental difference between fixing the culverts faster or fixing them more slowly, because they are going to get fixed no matter what.

The state finally admitted in its post-trial brief that it is this incremental or marginal cost that counts. But the analysis the state did of that cost in the post-trial brief is nonsensical. It did not address the relevant margin or the relevant increment, which is the difference in cost between fixing 800 DOT barriers in 20 years or fixing 800 DOT barriers a century or more over the current rate. Instead, the state compared the cost of all 800 barriers in 20 years versus

correcting some small fraction of that by using their current correction rate in that same 20-year period. In other words, at the end of the 20 years the state's analysis stops the clock, completely ignore the fact that there would be costs for another 80 or 100 under the state's proposal.

The state's calculation of the incremental cost is further inflated because, in fact, the plaintiffs are not asking that the state must correct all 800 of those barriers. We have given the state a very substantial out, by proposing if the state will simply finish its ongoing habitat survey, so it actually knows how much habitat is there with a reasonable degree of certainty, that it would only have to open up 90 percent of the habitat, fix enough DOT culverts to open 90 percent. Mr. Benson's testimony, AT-323, shows that should be about 577 culverts. So that is the incremental cost question, your Honor. 577 in 20 years or over a much longer time period.

After you take out that 577, the remainder of the 800 could be fixed at the remainder of their useful life, which is what current state law provides.

There is another problem with the state's cost arguments, your Honor. The evidence does not support their claimed cost for fix of $2.3 million. The state's approach to that average cost has been misleading from the first day of trial.

In the state's opening statement there were two culverts that were addressed in particular. One was Mill Creek, which we were

told was a $1.6 million fix, and, quote, was on the medium to smaller side of the fixes. But if you actually look at Mr. Wagner's testimony, he testified that the Mill Creek fix was a 37-foot wide stream simulation structure. It was one of the widest stream simulation structures the state has ever built. It was not on the medium to smaller side.

Another example used in opening was Terrell Creek up in the Lummi country. We were told that the cost of that project for the culvert fix was $2.3 million. If you look at the evidence, that project was a highway project. If you look at the documents in the record, it is a highway project, not an I-4 project. And Mr. Wagner testified it is not possible in a highway project like that to tell what part of that $2.3 million total cost was because of the culvert fix and what was because of the other highway work being done.

So that misleading approach has been compounded by the state's use of a nonrepresentative list of only 38 culverts to come up with its $2.3 million average cost. On cross-examination, both Mr. Wagner and Mr. Carpenter from the Department of Transportation, admitted they had made no effort to determine whether those 38 culverts on that list were representative of the full sweep of 800 to be corrected.

But the plaintiffs did make that comparison, your Honor. And the Court can as well. If you look at AT-323, it lists stream widths for all 800 of the remaining DOT barriers. It shows the

38 culverts on that scoping list are significantly larger streams than the norm, and thus will have higher costs.

Finally, that $2.3 million estimate is inconsistent, and inexplicably inconsistent with the 2007 estimate which the state also prepared in a proposed exhibit back when trial was meant to be in 2007. And that 2007 exhibit shows that future DOT corrections could be expected to cost $850,000 on average.

Now, according to the State Department of Transportation's construction cost index, which is in the record at AT-217, inflation from 2007, when the cost was meant to be $850,000, to 2009, when we did trial, was 12 percent. You add that 12 percent to $850,000, it should have brought the cost up to $952,000. It does not bring it up to $2.3 million, your Honor.

The misleading nature of the state's testimony and argument regarding the average cost continued when the state's witness turned to address the budget as a whole. Mr. Moore stated that culvert spending would threaten programs for the state's most vulnerable citizens. He said you can't just borrow more money or pull money out of some pot for culvert fixes, because there are debt limits and spending limits under state law.

What he didn't say until cross-exam is those social programs for the most vulnerable, like salmon recovery, are general fund programs. And those debt limits he spoke of apply only to the general fund. And the spending limit applies to the general fund. And none of them are relevant to the Department of

Transportation corrections that will consume the vast majority of the money needed to vindicate the plaintiffs' treaty rights by fixing various culverts. Nor will fixing the barrier culverts that DOT has cause a crisis within the Department of Transportation's own budget.

Mr. Moore acknowledged that the impact of fixing culverts on the DOT budget depended on how much a culvert would cost to fix and how many of them there were to fix. He admitted on cross that he didn't know either of those things. So his statement that fixing barrier culverts is going to remain -- that the safety of millions of Washingtonians is impaired is pure hyperbole, it is baseless.

In fact, your Honor, we do not deny accelerating DOT culvert fixes will require some shift in the Department's priorities. But if you look at the total budget for the Department of Transportation, at the time of trial, $5.8 billion, and the highway construction budget of $4.4 billion, whatever the incremental cost of correcting these culverts faster is will be dwarfed by that budget.

The final point, your Honor, I want to make regarding the evidence presented at trial is this: The injunction will not rob the state of its legitimate discretion; it will not mire this Court or the parties in perpetual implementation proceedings. The injunction is, in fact, minimal in relation to the treaty violations. And the plaintiffs have striven to balance in their

injunction terms between very specific language, which would make quite clear the state's obligations, but which the state would surely call too intrusive, and very general language, which the state would say we don't know what it requires, but which is intended to give them full discretion.

In numerous places the proposed injunction borrows from the state's own current policy and does no more than insure that current policy becomes actual practice in the future.

Provisions that fall under that category include the inventory. The plaintiffs proposed that the existing DOT and DNR inventories of barrier culverts be the basis for what has to be fixed in 20 years or by 2016. The plaintiffs proposed that WDFW's current inventory methods can be continued into the future. The correction schedule is borrowed from state law for the natural resource agencies, that 2016 deadline, and it is borrowed from the Department of Transportation's own 20-year correction deadline, which it had in its own policy documents up until 2004.

The design standard, pass all fish at all life stages, is taken from the State Forest Practices Act. The proposed hierarchy, once you decide to build this -- the proposed hierarchy of design options, where you would look first at, do we need to put something there, do we put a bridge there before you look at a culvert, is straight out of the WAC for stream crossing structures.

So the injunction would impose some new requirements. And it does so in places where the existing state programs are woefully inadequate. Thus, the injunction would require that the state actually monitor all of its fish passage corrections for effectiveness.

The evidence at trial showed that what is currently done for DNR, they go out and look at their culverts, the big ones, after a major storm. In other words, they do a drive by. There is no systematic program of reinspection. For the Department of Transportation, there is a one-year inspection period for a third of the fixes done with I-4 funding. And that is it. There is no comprehensive program. And that is essentially to insure that these fixes are actually effective and stay that way.

Maintenance, your Honor, is similarly included in the injunction because the current maintenance programs are inadequate. The Department of Transportation has no program aimed at maintenance for the purpose of insuring fish passage. What it has is a maintenance program aimed at insuring the structural integrity of the culverts. And that program, if you will recall, was recently rated the worst of 32 categories of DOT maintenance programs in their management accountability process. One of the regions that comprised the case actually got an F-plus grade for their maintenance program.

Finally, your Honor, the injunction would require that the state do something which the evidence shows is essential to

prevent ongoing future harm, and that is to develop a program of ongoing inspection and correction of barrier culverts. No agency currently has such a program, and the evidence is clear it is almost inevitable that there will be additional barriers in the future, and they will continue to deprive the tribes of harvest if there is no program to find and correct them.

In those places where the injunction imposes new requirements, your Honor, that are not borrowed straight from state practice, the requirements are deliberately phrased generally. They are intended to insure that the state not wholly default on aspects of culvert correction that are essential, but to leave the state as free as possible to fill in technical details.

Now, the state portrays this injunction as fraught with complications and intrusions. It is not so.

The state contends in its post-trial brief that it will be compelled under the proposed injunction to develop a new adapted management program. Well, unlike the state, which insists on clinging adamantly to the status quo, the plaintiff actually listens to the concerns of the other side, your Honor. We revised the proposed injunction from pretrial to post-trial and deleted the reference to adapted management. What the injunction would now require is simply monitoring of the effectiveness. That is the essential monitoring that could be used for an adaptive management program. We think that the biologists for

the State of Washington will want that, and will do it, and work with their tribal counterparts to develop it, but it will not be required by this Court.

Similarly, the state contends that it will have to use whatever design represents best available science. Again, the best available science language has been stricken from the proposed injunction that was filed post-trial. What the injunction now does is merely note that the stream simulation design is currently the best science.

The state also contends that it may have to prove to the Court in advance that its designs are adequate, but there is nothing in the injunction that would require that, and there never has been.

The state argues that an injunction to prevent it from operating barriers in the future, requiring it to correct barriers in the future, will lead to perpetual judicial supervision. But, your Honor, this is a permanent injunction. That's what permanent injunctions do. They require that the situation change for a long time.

On the remand in the Winans case, the Winans brothers were not ordered that they could have three fish wheels in the river, but after five years they could have more. It was perpetual. And when this Court enjoined numerous state regulations in Final Decision One, it was not for a short period of time, it was forever. And should the circumstances change in the future, such

that the terms of this injunction become inequitable, the state is free to make a motion to modify under Rule 60, and under the Rufo decision from the U.S. Supreme Court.

So, in summary, substantively and procedurally, the injunction the plaintiffs have proposed is limited, and it is as deferential as it can be and still get the job done.

We do not deny that there will be some implementation disputes. Although, we note, as the Ninth Circuit recently noted in an unrelated sub-proceeding, things have changed a lot in 20 years, in terms of how the state and the tribal technical people get along.

We believe that providing some basic standards in an injunction will actually avoid future disputes, more than giving the state no guidance at all in terms of how it is to comply with the treaty duties of the state that the Court has already declared.

And to the extent that some of those disputes are technical ones, the Court can refer them. There is the Fishery Advisories Board. The Court can create a culverts advisory board. You can order alternative dispute resolution. You can order mediation. There are a lot of ways to solve those kinds of disputes before they get before the court.

Finally, your Honor, in addition to overstating the intrusive effects of this injunction, the state would apply a novel legal test to evaluate it. In their post-trial brief, they appear to

argue that every component of the injunction must address a separate irreparable injury. For example, they argue that the plaintiffs must show that they suffered irreparable harm from the current inadequate system of notice to tribes. They must show that they suffered irreparable harms from the current inadequate monitoring systems for culvert corrections. But the state cites no case that requires that every single element of an injunction be supported by a separate irreparable harm. The plaintiffs have been unable to find them. Instead, the principle is very straightforward. A court of equity has broad and flexible powers. Once irreparable harm has been shown, it can reach out and do what is necessary to prevent that irreparable harm from continuing or recurring. In this case, both monitoring and notice of implementation activities are fundamental to insuring that the corrections are done properly and to giving plaintiffs their due.

So, in summary on my fourth point, your Honor, the evidence shows that the plaintiffs have suffered irreparable harm and their injunction will do no more than provide the minimum elements of an effective correction program.

In conclusion, your Honor, the plaintiffs don't want to make light of the burden this injunction will impose. We understand full well it will require a lot of work. It will require a lot of money. But the alternative proposed by the state is to leave the fate of the culverts, the fate of the salmon and the fate of

treaty fisheries entirely in the state's discretion with no injunction. It is to leave the status quo. And we know what that status quo is.

The state's alternative would insure that these barriers, which have been declared for the last three years to be in violation of the treaties, would remain for decades, if not for centuries. That would shame equity, that would thwart the treaty promise. The plaintiffs therefore pray, your Honor, that you grant the injunction as they have requested.

THE COURT: Thank you very much. Mr. Monson.

MR. MONSON: Good afternoon, your Honor. May it please the Court. Peter Monson for the United States of America. First, let me just say the United States joins in the remarks Mr. Sledd just made, as we do in the request for the proposed injunction that was filed post-trial with the amendments Mr. Sledd has outlined.

That would bring me to the first of three brief points I intend to make. In our post-trial briefs, we pointed out the fact that the United States has joined in the plaintiff tribes' request for relief militates against any Eleventh Amendment defense the state has argued. We briefed that quite extensively. We pointed out a case that is very much similar to this one, the Mille Lacs Band versus Minnesota case. Unless the Court has questions, I don't intend to address that matter any further. I think we briefed it adequately.

Our second point is that the United States places great importance on the correction of culverts in the Pacific Northwest. And there is two points I would like to make under that. First, we presented a witness at the end of trial, Dr. Philip Roni, who discussed the importance of correcting culverts. And I will get into his testimony in just a moment.

And the second point is that, although we did not have testifying witnesses to this fact, we did have evidence in the record regarding Forest Service corrections on national forest lands, and the acceleration that they have undertaken. I will briefly address those points as well.

The correction of fish-bearing culverts is of great importance, in part because of the rapid response that they provide. As Dr. Roni testified in his direct testimony as rebuttal to Dr. Koenings, reopening habitat that has been blocked by -- whether it is blocking culverts or other matters, is akin to opening the back gate and letting the dogs out. And fish, like dogs, will run free and will go and explore the new territory that they have heretofore been excluded from. In the context of fish, it happens within a matter of literally days. If they can access previously inaccessible habitat, they will do so as quickly as they possibly can.

Fish-blocking culverts are a problem not only in terms of fulfilling the tribe's treaty rights, as Mr. Sledd has so eloquently discussed, but it is also important from the

standpoint of meeting the Endangered Species Act requirements and recovering salmon to a non-threatened, non-endangered status.

As Dr. Roni indicated, and I think Mr. Sledd alluded to this in his remarks earlier as well, there are two first steps that need to be taken for purposes of salmon recovery, to protect the high quality habitat that exists and then, secondly, to reconnect isolated habitats. The culverts fit into that secondary category. Reconnecting isolated habitats is one of the top two most important things that can be done. Correcting fish-blocking culverts fills that requirement very successfully.

Dr. Roni testified that reconnecting habitat is one of the most successful restoration actions because it relies on existing habitat. You don't have to create new habitat. Although certainly improvements may be required. And also, as I mentioned, fish recolonize new habitat very, very quickly.

In addition, in rebutting Dr. Koenings' testimony regarding trying to address all of the Hs all at once without any prioritization of one over the other, Dr. Roni described that as doing a lot of things across the landscape, but not really trying to address some of the key factors first.

That approach is flawed because you do a little bit here and a little bit there, but you never really get to the most critical items. And those, in Dr. Roni's view, were, again, protecting existing high quality habitat and reconnecting isolated habitats.

He pointed out that, while limiting factors analyses are very

important in salmon restoration, they have to be done correctly, and they have to really, truly analyze what those factors are and how they limit restoration and limit salmon production in those habitats.

Habitat reconnection is one thing that can be done very quickly with positive results, without a great deal of analysis required.

And Dr. Roni, finally, noted that culvert corrections do not necessarily conflict with other salmon restoration activities. In many cases, such as with DOT highways and roads, the funding sources are completely different. And Mr. Sledd has alluded to that as well. The state witnesses confirm that fact, that the budgets for salmon recovery are oftentimes much different -- come from a different pot of money, whether it be federal money or money expended through what is called the SRF Board, the Salmon Recovery Funding Act board. Those funds are different from where the funds would come from, with respect to Washington State Department of Transportation funds.

In short, the injunctive relief proposed by the plaintiffs will not cause the state to have to rob Peter in order to pay Paul in terms of salmon recovery.

Now, on cross-examination, Dr. Roni was asked about a PowerPoint presentation. This is the point the state has made in its post-trial brief, to try to paint Dr. Roni's views as suggesting that culvert corrections are not very important and

not very productive in terms of salmon recovery, and maybe money should be spent elsewhere.

The PowerPoint presentation was lacking a couple of things. One, it was lacking the actual underlying presentation. It was just the bullet points. Dr. Roni mentioned this, and tried to explain, no, that wasn't in fact what he intended to convey with the PowerPoint presentation.

Secondly, the PowerPoint presentation was not the result of a comprehensive study, it was simply a hypothetical watershed that was being used to provide an example of how scientists and people in the business of salmon recovery might go about prioritizing recovery actions in a given watershed. It wasn't intended to say, well, these things should be done first because every watershed is different. All of the witnesses seem to agree on that point.

Sort of the bottom line here is, with respect to that PowerPoint presentation, Washington Exhibit 200, is that it was really based on a hypothetical estimation, and Dr. Roni clearly clarified on redirect that in fact it was a -- it represented a large underestimation, and that the correction of barrier culverts is still a very important factor in salmon recovery.

So this brings me to my third and final point, and that relates to the importance placed on culvert corrections and barrier corrections by the Forest Service. As I mentioned, we were unable to present witnesses at trial from the Forest Service

because both individuals were called away, one for a family emergency, and the other was out of the country. But we did -- There is evidence in the record regarding the culvert corrections efforts that the Forest Service has undertaken.

In 2005, the Forest Service culverts were not in very good shape. The state has pointed that out in prior briefing when they sought to assert a claim against the United States in this very case. However, since that time, the funding effort and the work the Forest Service has done to correct its own barrier culverts on forest land has increased dramatically. The base funding has increased by some 67 percent. I am looking at Exhibit 187, U.S.A. It talks about there have been increases in recurrent funding from 2005 to 2009, from 4.6 million to 7.7 million. In addition, there was two substantial, one-time appropriations exceeding $25 million the Forest Service is using to correct culverts and decommission roads and do other things in the Pacific Northwest and in the case area. A summary of these expenditures and the accomplishments that have been made with those monies can be found at U.S.A. 188, U.S.A. 189 and U.S.A. 190.

It is important also to note that the Forest Service has developed a very extensive methodology for correcting culverts, that being the stream simulation manual that it uses, which is very similar to the one the state uses. But it uses that on anadromous streams. It uses that methodology exclusively for

correcting culverts that it is trying to correct on its lands in the case area.

I would also note that the Forest Service is on track to try to meet the same 2016 deadlines that the Washington Department of Natural Resources agencies are seeking to meet.

So, in conclusion, from our perspective, we want to see the DOT culverts fixed because oftentimes they are located downstream from national forests. In order to make the improvements that are occurring in the upper stream reaches more effective, and increase production of salmon, we want to see the downstream corrections being made as well. Without those corrections on the state culverts, the federal culvert corrections benefits will not be fully realized.

For those reasons, as those stated by Mr. Sledd earlier, the United States urges the Court to enter the plaintiffs' proposed permanent injunction regarding culvert correction. We thank you, your Honor. I will stand for any questions if you have any.

THE COURT: Thank you, Mr. Monson.

MR. MONSON: Thank you.

THE COURT: Mr. Tomisser.

MR. TOMISSER: Good afternoon, your Honor. The remedies requested by the tribes in this case, ranging from the acceleration of the state's barrier program to the federal jurisdiction over culvert design, are ultimately aimed to achieve one goal, the increase in the abundance of salmon available for

harvest. The abundance theory presented by Mr. Sledd, as he mentioned today, in which every existing barrier is a breach of the treaty, is a treaty that requires no more showing of action under the Steven's treaty than to make a general assertion that abundance is diminished from some unarticulated, undefined, unproven level, and that some state action is a depressing factor upon the number of salmon. That is all the Court needs to adopt as a remedy under the treaty.

I think that this is not the correct vehicle for -- it is not a correct vehicle to increase the abundance of salmon. And I think it is important, your Honor, to consider the abundance theory in the context that this treaty was signed.

Is the Steven's treaty, a document created in the 1850s, a proper vehicle to solve the challenges posed today by concerns over the abundance of salmon and the scarcity of the resource? If we consider what was thought about at the time the treaty was executed, one of the primary assumptions that has been noted by a number of commentators and courts over the years is that the supply of salmon was thought to be inexhaustible, essentially an unlimited resource. There is the colorful description that was offered at the time of the treaties: Salmon were abundant in such numbers that a person could cross the river without getting their feet wet merely by stepping on the backs of salmon. Such was the abundance available at that time.

It is, therefore, not surprising, given that fundamental

assumption underlying the treaty, that there is no mechanism built into the treaty to assure any particular level of the resource. There was no reason to think about that at the time, under the assumption that the resource is inexhaustible.

The other consideration that was at the center of the treaty at the time it was signed was the knowledge that there was going to be growth, there was going to be settlement, there was going to be an increase in the population. All of these things, or both of these things, were primary considerations at the time the treaty was signed.

Fifty years later, your Honor, on September the 27th, 1908, to be precise, the anticipated growth and development happened in a very quantum way, in a way that changed the world forever, in a way that was unimaginable at the time the treaty was signed. We look forward today -- Our own corner of the world is almost unrecognizable from the time that the treaty was signed.

It is not surprising, therefore, your Honor, then to consider at the time that the treaty was signed, a vehicle was not going to be capable of solving the problems of today. The problems of today, problems of abundance, problems of scarcity, are modern problems, problems for which new laws have been created to deal with.

Although Mr. Sledd takes me to task for mentioning the Endangered Species Act, the state Salmon Recovery Act, the Forest Practices Act, those are modern tools that have been created to

deal with the modern problems. There is nothing in the treaty itself that in any way assures any particular level of abundance. It was not part of what was in the treaty, and should not be written into the treaty by this Court.

Once the Court begins to consider the abundance theory as a viable cause of action, there is no logical distinction between culverts as a factor that diminishes the relative abundance of salmon and any other limiting factor that the state may possibly be involved in.

The Court heard testimony about the four Hs, and how all of them are important factors for salmon recovery, habitat having a variety of limiting factors. The state is involved in every aspect of these four Hs, including multiple impacts potentially on habitat. If the abundance theory is correct, your Honor, that the Court need only identify some state action that creates a downward pressure upon the salmon, then, according to the plaintiffs, that action is now subject to remedy by this Court under the treaty. That's an extension that would be unthinkable at the time that the treaty was signed. It is a right that has never been recognized by a court.

Having said that the treaty is not the proper vehicle for the tribes to receive a remedy in this case, that is far from saying the treaty no longer has a purpose. The treaty does have a purpose. The treaty remains viable and contains important rights for all parties to it.

The courts have identified two broad, substantive rights that flow from the treaty. The first is the core decision establishing that the tribes are forever to be granted access to their usual and accustomed fishing areas. That right is not involved in this particular case.

The second broad right is involved. That broad right deals with the entitlement of the tribes to a fair share of the available catch. If the Court looks at the decision in 1979 from Fishing Vessel, the court describes the second of the two rights, saying, "The purpose of our cases is clear. Both sides have a right secured by treaties to take a fair share of the available fish." That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens. What the court says there is, it is a right to a fair share of the available fish, not an inherent right to establish a certain level of availability. This distinction is important, your Honor.

If you look back a little bit further, we gain more understanding of what Fishing Vessel was talking about when they talked about a fair share, what is a fair share and what did that mean in terms of the treaty.

If you go back and look at the Department of Game versus the Puyallup Tribe, you see the analytical roots for how the Court should be applying this particular right to the treaty.

What the court established in the Puyallup series of cases

was what the treaty was concerned with preventing was future state action, as new territory was developed, that was going to be unfair in its treatment of tribal access to the resource.

What the court in that case said was unlawful was any state action that had either the intent or the effect of discriminating against the ability of the tribes to take their fair share of the available fish.

And when you look at that ruling in context, it makes sense in historical terms. The concern was we need to allow the tribes to have access to the resource that they had historically depended on. What we are not going to allow the state to do, is to come in, and through state action, or state laws, or unfair practices, push the tribes off that resource, so that when the tribes dip their nets into the water, they come up empty, whereas the non-tribal fishermen are able to take the catch. That is what was prevented. The idea was to insure the tribes the ability to get a fair share of the catch that was available. That is a very different right than the right Mr. Sledd and the tribes are asserting in this case, which is a right to some undefined quantum of fish in a treaty. That is what doesn't exist. But it has become the issue for us today because the fundamental assumption -- one of the fundamental assumptions in the treaty has changed, the assumption that the supply itself is inexhaustible. The problem of abundance, the problem of scarcity is a modern problem, not one the treaty was designed to resolve.

I tried to be careful with my opening remarks here about the treaty not being available to remedy culverts, because even under the Puyallup decision and in Fishing Vessel, it would be theoretically possible under that construct for a culvert to be a breach of the treaty. I can describe for the Court in those cases what a prima facie culverts case might look like.

If we look at the Puyallup decision in Fishing Vessel, a prima facie culverts case, for example, would include perhaps a tribe that was able to come in and identify that historically they were dependent upon a particular run to catch their fish; and that at some point in time the state had come in and built culverts in a way that was impacting that run of fish, but impacting in a way that was denying the tribes their right to a fair share of that run, whereas non-tribal fishermen were still able to exploit the run. In that situation, you would have evidence of a state culvert that was having a discriminatory impact on the ability of a tribe to take their share of whatever that run would be. That would at least be a prima facie case of a breach of culvert (sic) that would come under the treaty. That isn't to say that the Court would automatically issue an injunction, but at least you would have a prima facie case to review.

I want to turn to general considerations for the Court in looking at the remedy that has been requested by the tribes. There are several considerations that the Court needs to take

into account when looking particularly at granting an injunction against the state government. The first and most basic rule is, of course, the plaintiffs have the burden of proof in presenting their case to the Court and satisfying the Court on a more probable than not basis that they are entitled to the equitable remedy they are requesting.

The second broad principle the Court can see from the case law, is that the remedy must fit the breach, so that we don't get into the problem of the remedy being overbroad. And overbroad remedies are found when the Court's remedy applies to things that haven't been proven as part of that breach and in need of the remedy. That is a significant problem for the presentation of evidence in this case by the tribes. When you look at what we would propose to the Court to be the prima facie case, there is a stunning lack of evidence. In fact, the tribes have never moved beyond the generalized assertion that fixing barriers is good. We know that fixing barriers is good. That's why we have spent tens of millions -- hundreds of millions of dollars trying to do that. The question is, is fixing them -- have they proven that fixing them faster is going to produce any benefit. That's what they haven't done.

They have approached the case in an unusual fashion, your Honor, asking for a case-wide injunction to fix the barriers. And yet there is no evidence presented to the Court that all of the watersheds need an injunction. In fact, the testimony

presented by the witnesses was that every watershed is different and needs different things.

The best way to approach that problem then is in the way that has been described in which plans are developed at the watershed level. More needs to be done. But then you apply the remedy that is needed for that watershed and for that species. A one-size-fits-all remedy over the entire case area, in light of the testimony that not every watershed needs that remedy, is inherently overbroad.

Another consideration for the Court, and this one is fundamental, is the problem of a federal court getting into the area of institutional reform. I do believe that the remedy requested by the tribes in this case in some respects does cross the line into institutional reform, and all the federalism concerns that flow from that.

This is how I think they do that in two specific ways: First of all, although they presented it innocuously, plaintiffs asked the Court to take control over the design of culverts. Currently under state law, the state can fix culverts using stream simulation, the hydraulic method, or no slope, all of which are designed to pass fish at all stages. That is what is currently allowed under state law.

What the plaintiffs have asked the Court to do is to say, no, stream simulation must be the default except in emergency circumstances. That is an act of institutional reform, because

the state court is telling the state, you cannot do something that is currently allowed under state law, you must choose only this option.

The much larger concern when we look at the institutional reform is the effect on the state budget. And I will get into this cost dispute in a little bit. But regardless of whether you think the state's numbers were accurate, or Mr. Sledd's numbers were more accurate, underneath either analysis, as Mr. Sledd admitted in his closing, the Court is going to be reorganizing the state's budget to some extent. The Department of Transportation budget, or whatever budget, in order to meet the goal of repairing the culverts within a 20-year period, the plaintiffs in this case acknowledge, the spending priorities are going to have to be reorganized to do that. Once the Court sets a performance goal that has to be met by the state that requires the reorganization of the budget, you're instituting institutional reform.

The reason I mention that, your Honor, is because institutional reform is not a matter to be taken lightly. And I'm sure the Court doesn't take it lightly. When you look at the cases in which institutional reform has been ordered, they are generally cases where the Court is facing a recalcitrant defendant, a state actor who is defiant of federal law or simply has no ability to come into compliance with federal law.

This is an aspect of the case that I get most discouraged

about when I hear Mr. Sledd disparage the efforts that have been made. Far from being a recalcitrant actor, the State of Washington in this case, by the undisputed evidence, is actually a leader in the area of salmon restoration and recovery. The State of Washington, from scratch, without a threat of federal court intervention, developed a program for the inventory, the prioritization and the correction of a barrier system on its own, and put that system into place.

It has been consistently funded through the years through a variety of sources. It has developed a model for deciding how to spend money to get the most bang for the buck. That was done through the development of the priority index. The state has been recognized throughout the nation as being a leader, far from being the recalcitrant defendant that courts generally reserve institutional reform awards for.

When you look globally at what the state has done, you look at the SRF Board spending. The State of Washington over the last decade spent $143 million on salmon-wide recovery projects. We have put programs into place that qualify for federal assistance, thereby increasing our ability to fund projects. The federal government contribution to that is $216 million, for a total of $360 million in one decade, spent by the Washington State Salmon Recovery Board, an office whose functions are overseen by the governor's office, and who make decisions based on the very work of people that were witnesses in this case, state biologists,

tribal biologists, federal experts who develop the plans to get funding, to develop the priorities for how they should be spent.

You can see as a subpart of these totals, 21 million on barrier corrections, another 22 million from the federal government. That money is in addition to the money spent by DOT and DNR to correct their barriers. All of this work is being done. None of it places the state in the position of being a recalcitrant defendant unwilling to do what is necessary for salmon. What the state has done is taken extraordinary leadership and taken the responsible steps within its means to get as much done, and to do it in a scientifically sound way, the product of collaboratively scientific work, not the product of litigation and court decisions on what ought to happen.

So what has happened? Mr. Sledd contends there is no plan. In fact, there are plans. This comes from an exhibit admitted into evidence. It is the key excerpts from the Puget Sound Recovery Plan. It is called the Chinook plan. But it will benefit every fish that swims in Puget Sound. It is a plan that, according to the scientists, has a 50-year time horizon, at a cost of $1.24 billion, and more than a thousand associated actions. That plan is in place, your Honor. And it is not the only plan.

Dr. Koenings testified that more of this work needs to be done, that what we need to do is look more closely at each watershed so we know what each watershed is. That work is being

done and it is in progress. As Dr. Koenings described, these coordinated plans and trying to get this coordinated is of relatively recent origin. The plans are working, they are scientifically sound, and ought to be allowed to continue to work.

Another example is the Hood Canal Summer Chum plan. In fact, Kit Rawson also talked about the plan -- the Snohomish ten-year plan in that particular case.

As a part of these plans, your Honor, an extensive limiting factor analyses were done. If we look just at habitat, what the witnesses testified was that every watershed has different problems and needs different solutions.

Significantly, the plans do not place barrier corrections at the top. Barrier correction is certainly a part, and it is more important in some watersheds than others, but estuary restoration actually ranks at three-quarters of watersheds as a top priority.

Why should the Court order the shift in this case, as we present to the Court, of $164 million in funds to put barriers at the top of the list, when the analysis that has been done so far shows the Court that actually estuaries is where that effort ought to be directed?

When we look at the work that has been done by individual state agencies, in addition to what has been done through the SRF Board and other agencies working on salmon recovery, you look at what DNR has accomplished in this case, the correction of more

than 700 barriers within a decade, as Alex Nagygyor testified in this case, although it will be close, they believe they are on track to meeting the goal of fixing the barriers by 2016. The tribes are fine with that target. There is no need to federalize that portion of the plan.

When we look at DOT, DOT's barrier corrections, through a combination of a couple of different sources, as was described to the Court, first, in the course of simple highway construction projects where a correction can be made within the scope of a highway project, the correction to the barrier would be made at that time, generally also trending now heavily towards using stream simulation as the method of choice.

The other source of barrier correction is in a unique standalone program, the I-4 program, which contains a specific budget line just for barrier corrections. As the Court can see, the program has been funded consistently from its origins in the early '90s up through today, to where we are up to just under $20 million. That rate of budget increase, your Honor, is a multiple of what Mr. Monson has just testified was done on behalf of the federal government with their 67 percent. We are closer to a 300 percent increase on the I-4 alone. And, of course, that doesn't count the other fixes being done by DOT, DNR and through the SRF Board. So, in fact, the state's efforts at barrier corrections in this case is broad and crosses multiple agencies.

As a result of various efforts that have been done, your

Honor, the salmon recovery plans have a slide that puts together a snapshot essentially of where we are and what remains to be done. You can see that over the last decade in this particular area -- This is just looking at habitat and the limiting factors relating to habitat. You can see passage there on the right side of the pie chart. Passage, this is barrier correction essentially, actually affects amongst the fewest of the ESUs, the evolutionarily significant units. It actually affects fewer than most of the other corrections. And yet this is the area where most of the work has been done already. The plaintiffs have provided no evidence as to what additional gain might be achieved if that effort were to be accelerated, and accelerated at the expense necessarily of something else. Because the shift in funding, your Honor, has to come from somewhere. Mr. Sledd has described the budget. He has described everything except where that $164 million per biennium is going to come from. It has to come from somewhere.

I review that evidence with the Court really for the purpose of talking to the Court about the lack of need for an injunction, the lack of need for this Court to begin down a course of institutional reform. The State of Washington in this case is not the kind of defendant for whom that sort of remedy is awarded.

If we look beyond that, your Honor, to the more specific elements of what is required in order to impose an injunction,

the first major element is whether or not there has been significant and irreparable injury.

Well, when we look at the history of tribal harvests in this case, what we see is fluctuation in what the tribal harvests have been. This evidence goes back to the date of the Boldt decision, and then up through 2007. And so what we can see is fluctuation.

Mr. Sledd has emphasized repeatedly in the brief that this is a case about culverts; it is not a salmon recovery proceeding, he says, it is the culvert proceedings. Well, presumably we would have had some evidence about what is the impact on culverts in relationship to tribal harvests. Now, on summary judgment the Court said, I am not going to require mathematical precision in presenting that analysis. What the Court didn't say, I am going to allow you to proceed and get a remedy with no evidence whatsoever. That is exactly what this Court has, no evidence on either a watershed basis or a case area wide basis that gives the Court any means at all to measure how much is being done.

Mr. Sledd suggests in his argument this kind of mathematical formula. That is the methodology that was rejected by this Court as unsound. You cannot take the potential area that might be available and multiply it by some number and come up with production. That is the methodology that was rejected. The tribes presented nothing else in this case to satisfy the burden of what that injury would be.

The plaintiffs do bear the burden of showing what the degree

of that injury is. If the Court can't have some way of measuring what is the extent of that injury, the Court has no way of knowing whether or not the remedy it's imposing is going to match the breach. If you can't know, the Court is stuck with speculation as to how much injury was actually caused by the culverts, and what am I going to get if I order the state to accelerate this program. The Court doesn't have anything to work with in looking at that.

Interestingly, your Honor, if you look at this particular chart, and I have superimposed a red line on it -- This is not on the exhibit that is admitted. This red line marks 1991, which is the beginning of the state's barrier correction program. And interestingly, it was the plaintiffs' burden in this case to prove that culverts had a deleterious effect on the tribal harvests. It doesn't look that way, does it? If you look at the left side of the case, and you look at my next slide, which is the state highway center line chart, what you can see is that from the late '60s, up through today, the miles on the state's center line miles have remained essentially constant since the late '60s. About 98 percent of the current system has been the same, along with all of the associated culverts and barriers in that system.

So if we weren't fixing barriers in any kind of a regular pattern until 1991, then 1990 or so should be the period of time in which the culverts are having a maximum impact on tribal

harvests. That is when they are the worst. That is before anything is getting fixed. What do we see when we look at the evidence produced in this case about what tribal harvests were? It is going up at a time the culverts are presumably at their worst in this case.

When you look at the other side of the chart, once the state starts repairing barriers in a consistent manner, you can see generally the trendline of tribal harvests is down. According to this evidence, Mr. Sledd's case would have established that fixing culverts must be bad for salmon. That is, of course, not the case, as we know.

What is significant here, your Honor, is the absolute lack of any correlation between the state highway system and tribal harvests.

What we heard from tribal witnesses and state witnesses in this case is the extreme spikes that we see in the mid to late '80s are attributable to overharvest, harvest levels that were irresponsible and not designed for sustainable growth. That is why those spikes are high. There is no relation there to culverts. Fortunately we have a better cooperation now between state and tribal biologists and fisheries management, witnesses like Loraine Loomis, who sit and make decisions about fishing seasons, and insuring that we have responsible harvests going forward in the future.

Further problems with the plaintiffs' proof in this case, and

to emphasize the generalization they make about how much of a difference fixing culverts is going to make, can be seen on these slides, the slides that both Tyson Waldo and Brian Benson generated that show all of the different culverts, the state and non-state culverts, that block.

This evidence is presented to the Court from the state's view not to blame other landowners or, as Mr. Sledd says, to exculpate the state because somebody else is also bad. That is not the reason this evidence is presented to the Court. The reason this type of slide gets presented to the Court is to inform the Court about what is going to be the effectiveness of the remedy ordered by the Court.

Courts generally will not order injunctive relief and mandate action to be taken without some certainty about what we are going to get in return. What we know in this particular case from the evidence presented is there are only 42 streams that are not affected by other culverts, and that there are over 200 instances in which non-state-owned barriers are downstream of the state barriers, and that the overwhelming majority of culverts that exist in the state are not state owned.

We don't put this out to blame other landowners, but we put it out to raise the concern to the Court of how is the Court to know, based on the evidence produced from the plaintiffs, what am I going to get if I allow this acceleration to happen, to what purpose is that acceleration actually going to accomplish the

goal for which has been set forth. I submit on the evidence that has been presented, the Court has no way to know what, if anything, is actually going to be produced.

The plaintiffs have failed to provide the Court with any specificity necessary to show that they do, in fact, suffer irreparable injury due to culverts in this case.

The next factor for the Court to consider in weighing the remedy is the balance of hardships to the parties. When you say a balance of hardship, that necessarily implies that the Court will weigh on one hand against something else on the other. So presumably in this case we should be weighing what is the injury to the tribes and what are we going to get if we order the remedy that they ask for, and, on the other hand, what is the cost of that remedy going to be, and am I going to actually get it if I order this remedy to be granted.

I would remind the Court that the correction of culverts, I think as I have said in opening, you don't send the maintenance crew out there with a shovel and a bag of sand to fix a culvert in a day. These are months, if not years, in the planning, permitting, processing to get these sorts of projects done. They are significant endeavors that have to be engaged in by the state. The state's rate of correction -- I think Mr. Sledd was erroneous. The DOT rate of correction that you can see is closer to 14 a year. And that is just the DOT. That is not the SRF Board corrections or the DNR corrections.

So if the Court is going to consider the balance of interests in this case, what does the Court have on the tribal side of the ledger in terms of what is the injury and what is the return? As I have presented to the Court, the tribes have nothing but the generalized notion that doing something for salmon must be good, fixing barriers must be good, and a good thing to do. The state doesn't disagree with that. That's why we do it.

The question here is what evidence was produced to the Court to show that acceleration of that program is going to achieve some benefit that the Court can describe, a measure in some real term beyond that generalization.

On the other side of the ledger is the cost. There is a financial cost. There is also a systemic cost for the Court to go down this path.

Let me talk first about the financial cost. The state, in presenting its cost numbers -- primarily Jeff Carpenter was the one who knew the most about this, presented on behalf of the state, did not present the Court with 38 random projects. These projects from this particular exhibit are the next 38 projects to be done. Paul Wagner testified that these 38 projects are typical of the sorts of projects to happen in the future.

When you look at the next 38 projects, the average cost of all of them is $3 million. If you take out the Chico Creek correction, which is uniquely expensive, the average cost comes back down to 2.3. The reason we say that it is 2.3, your Honor,

rather than the other number, is because, if you look at the testimony of Mr. Carpenter, he described the things that go into this estimate. The things that go into this estimate include items that are not included in the fish passage report, the historical data cited by the tribes.

As Mr. Carpenter explained, the data relied upon by the tribes to reach their number doesn't include professional engineering costs or right-of-way or risk. The State of Washington is required to include those elements when it presents a budget proposal to the legislature. It is this sort of document that the state uses when it goes to the legislature to request funding for projects that is utilized, not the historic costs.

When you look at the total costs, your Honor, there are 800 barriers to be corrected, and Mr. Sledd says that each and every one of them is a breach. He talks about fixing only 90 percent of them. I don't know where that comes from. There is no magic to the 90 percent at all. They insist that all of them be done. For DOT, that is 800, 1.6 or $1.8 million in costs to do that. And it is not set over any years longer than 20 under the plaintiffs' injunction. The plaintiffs say at least 90 percent of them must be done within 20 years.

And so if you look at the 20-year horizon that the plaintiffs set out and have asked this Court to impose on the DOT for the correction of those barriers, and you look at the $2.3 million

average per barrier cost, that turns out to be $184 million per biennium to get that done.

Currently the I-4 budget, which is the standalone budget to accomplish this, is budgeted at just under $20 million. That is $164 million per biennium that this Court would be shifting away from other projects in order to make barrier remediation a priority. That is a substantial amount of money, your Honor, when you look at what can be done with that sort of funding.

The Court is being asked to order that shift of funds with no certainty as to how many salmon are actually going to be produced, what effect that is going to have on the tribal harvest.

The final element of cost that I want to talk about is the systemic cost of granting this injunction. Mr. Sledd noted one of the other sub-proceeding cases in which the Ninth Circuit has noted that things have improved, the relations between state and tribal biologists over the last 20 years have gotten better. The state and the tribes have shown an ability to work together. The plans that we have talked about, the plans discussed by Mr. Koenings, the plans, excerpts of which were submitted to this Court, the testimony of Kit Rawson, all talked about state and tribal members working together in a collaborative way on a local level to figure out what each watershed needs, what each species needs in this sort of collaborative environment. I'm sure there are disagreements about what must be done, but they are working

it out, and the plans are coming together.

Instead of having a collaborative scientific analysis and decisions about what should be done and in what order they should be done, the plaintiffs are asking this Court to step in and sit at the captain's table of that effort. It will now be for the Court to decide in what order things must be done, the product of litigation rather than the product of scientific collaboration. This is one of the bottlenecks that Dr. Koenings talked about. It would be inevitable.

Once the Court goes down the path of deciding that any downward pressure on salmon reduces abundance and is therefore within my grasp to remedy under the treaty, this Court will be presiding over every impact on salmon. There is no logical distinction between separating the culverts case from any other downward pressure.

The Court, contrary to what the Ninth Circuit has recently talked about, should not be in the position of a permanent federal agency managing fishing.

The plans, your Honor, are in place. The state has been active in working on those plans. More needs to be done. More is being done. The state has been a consistent actor in good faith. The Court, we would ask, should decline the invitation of the plaintiffs to sit now in perpetuity and decide how the resources ought to be spent.

It is not a small thing for this Court to simply brush off

and say, well, that really won't happen. Why wouldn't it happen, your Honor? Once the Court accepts the abundance theory as the entre into regulating impact on salmon, there is nothing that would be beyond the power of this Court to entertain in order to remedy that.

The Court I think has to come to grips with the fact that the treaty is a valuable document, a continuing document, but it is not the solution for every problem posed by modern society. It is not the vehicle to address problems of abundance and scarcity.

The Court should reconsider, we believe, the extent to which it may have bought into the abundance theory, without a showing that an abundance and availability of the tribe to access their share was actually being caused in an unfair manner by state action. Without that, the Court is simply placing itself at the seat of the center of salmon restoration efforts. We think that is inappropriate, and the Court should decline that invitation. Thank you.

THE COURT: Counsel, before you step down, I realize that the state's post-trial brief was probably a collaborative effort of several people, yet your signature is the first one that appears on there, so I am assuming you had a good hand in putting this together. On page 30 of your brief you talk about, in paragraph D, that, "The state should have the opportunity to revise its program before any judicial intervention." What did you mean by that?

MR. TOMISSER: That is a reflection, your Honor, of the cases that talk about the reluctance that a court would have to simply jump into institutional reform without giving a defendant some idea of what it expected, and allowing that defendant to then see if it could come into compliance without actually having an injunction in place. It was simply a discussion of that as a possibility that courts have sometimes exercised rather than coming right out and taking control and entering an injunction.

The court would essentially set forth its view of what federal law requires, and then give the state some time to come into compliance before actually entering the mandate. That was the point that was being discussed in that section of the brief.

THE COURT: That's what I thought you meant. How much time would you consider would be appropriate?

MR. TOMISSER: Since I don't think the Court should be considering an injunction at all --

THE COURT: This is all hypothetical, Mr. Tomisser.

MR. TOMISSER: Apart from hypothetical, I really don't think the Court should be entertaining an injunction.

In terms of a time frame, I think what would be appropriate, if the Court was concerned about what is the rate of correction and what is actually being done, what is the effect that we can see, if any, on the harvest. The Court I think would want to set some sort of a benchmark, collect enough evidence so that the Court could determine more specifically, okay, what is the tribal

harvest and what is, in those watersheds where barriers are an issue, creating pressure on the salmon, to what extent do those pressures exist, and what is the pace we can see of fixing those, and then to get a result.

Now, I think you would have to turn to the scientists involved and ask them, okay, if we have a particular watershed, and we know there are barrier culverts on that watershed, if we fix them, how quickly should we see results and be able to measure what we are getting? I think then the Court would have an answer to say, well, okay, that gives me some idea as to how long I would want to wait and see if the plans are working.

It is hard to pick an arbitrary number --

THE COURT: I understand.

MR. TOMISSER: -- without the scientists here to say --

THE COURT: Most of them are sitting back there. I understand. I guess what I am trying to get a grasp on, are we talking two, three years? Are we talking a decade?

MR. TOMISSER: It would be my hope -- And now I am happy to guess a little bit here. In terms of what is the available data that we might have today, so that we don't have to start with a benchmark today, but maybe we could look at some historical information to determine, okay, what was the situation in the past, and then how quickly did I see results from fixes that were made. Hopefully that data already exists, and so the Court could have an answer to that question fairly quickly, and

we wouldn't have to start from scratch and having to go out and make a new assessment. I think the data that has been collected by the state is pretty robust, and we would probably allow that sort of inquiry to be made, but I am reluctant to promise it off the top of my head.

THE COURT: All right. Thank you.

MR. SLEDD: By my clock, your Honor, the second game of the doubleheader starts within ten minutes. I will try to stay within that.

I would like to address your Honor's questions to Ms. Tomisser. In the plaintiffs' view, your Honor, we had a summary judgment that laid out some benchmarks, that said that the culverts violated the treaties. And we waited three years for the trial. The purpose of the trial was to come in and show how do we fix them. What the state came in with was saying, we don't want to do anything different.

Where courts have gotten in trouble is where a district court has entered an injunction without bothering to ask and have that hearing. We have had that hearing. There is abundant evidence to do exactly what Mr. Tomisser suggested, which is to set some basic guidelines. That is what we have tried to do in the injunction.

Now, if the Court looks at this evidence and thinks, you know, there is a piece here that went too far, let's cut it back, fine. That is your prerogative as a court in equity. But to

throw out any issue of guidance to the state now, and simply toss us to the winds to go out and try to come up with some integrated, complex plan that will figure out everything to do about salmon, goes well beyond the scope of this case. And it would postpone the vindication of treaty rights that the tribes have been waiting for for a long time.

We would urge the Court not to go that route, but to enter some injunction. And then, as the state has said, their technical people and the tribal technical people can try and flesh out the details. We need that skeleton in place.

I said I wasn't going to go back and talk about summary judgment. I can't resist a couple of comments. There is an awful lot that the treaties do not say. The treaties don't say you can't put in fish wheels that keep the tribes from getting any harvest. They don't say you can't put in a fence that keeps them from their fishing places. They don't say you can't have thousands of non-Indian sport fisherman that monopolize the harvest. The treaties were not intended to be empty documents. They are intended to be effective permanently.

And what the tribes bargained for was not, as the state seems to suggest, the graces of future state salmon recovery law. They did not bargain for a federal statute at some indefinite point in the future that says we will try not to make these fish extinct. They received very definite and specific promises from Isaac Stevens on treaty grounds across this state that their right to

fish would be unimpaired, even if they sold their land; they could continue to fish, as they had before, forever.

The treaty has others purposes as well. The fisheries have to be shared with non-Indians. There is a clear expectation that the state would be opened up to non-Indian settlement. That's why Stevens was there. But just because the treaties didn't anticipate every possible complication, does not mean a court has no role and the treaty has no role in trying to reach accomodation and adjustment which the Supreme Court referred to in Winans, the very first of these disputes to get before the Court.

There were no black and white rules laid out. It was a tough job that equity courts get paid to do, try and balance those interests. And to balance them in light of the purpose of the treaties, and to balance them, as the law says, with a full understanding of the way that the tribes would have understood the treaty promise.

And when the state says that the only thing the treaty promised was they will get treated fairly, that if the state destroys all the fish, it will destroy them for everybody, that is not the treaty promise. That is not what the tribes would have understood on the treaty grounds.

This treaty does more than just prevent discrimination. It does more than just say that the ESA will protect you at some point in the future. The tribes bargained for one promise. It

is in that treaty. And they bargained for it to be enforceable.

With regard to the state's recalcitrance or reluctance or leadership or bad faith, there is no case the parties have cited that said that bad faith is an element of getting injunctive relief. There is a four-part test that is familiar to all of us. The tribes and plaintiffs believe we have shown all four parts of those clearly. If there had been bad faith, I can tell you we would be asking for a lot more in terms of detail on this injunction.

Rather than go through again the whole argument of is it bad faith, is it recalcitrance, let deeds speak louder than words. Look at what has actually happened on the ground, at the magnitude of this problem and at how long it will persist. And that's what demands injunctive relief.

Again, with regard to recovery plans, where is the Coho plan? We have a Chinook plan for Puget Sound. Where is the coastal salmon recovery plan to help Mr. Johnstone, who talked about the loss of the fish that he grew up fishing for? There aren't any.

And, yes, there are some sub-basins that have a slightly more developed plan than others. Mr. Rawson, I believe, actually testified to the Snohomish sub-basin plan that Mr. Tomisser mentioned. They need to be everywhere before anyone can actually say, do this before that before the other.

In the absence of that, I fall back on that first principle that Mr. Wasserman said, more habitat would help the fish, and

the first principle that Dr. Roni said, which is, if we don't have these detailed plans, the first thing to do is open up the habitat.

I want to respond briefly to this graph issue. I will try my freehand here. We will see what happens. I think the graph that Mr. Tomisser showed of the tribal harvest was something like that. He said, well, you know what, the culverts were all in here before, they were over on the left side of this, so how come the harvest is going up when the culverts are already there. Well, you know what, the culverts were there, a lot of them, before. A lot of them have been wearing out and becoming barriers as time goes on. But if there were no culverts, doesn't it make sense that that's what we would see?

What has happened is that the culverts that have been there forever have lowered the baseline. And all these other fluctuations, in this case the upward pressure here, because the tribes are gearing up after the Boldt decision, it is superimposed on the ones already at a depressed level of fish.

This is a red herring to say, oh, my gosh, we put the culverts in 50 years ago and you're talking about a diminished harvest today. The point of the diminished harvest today is things are bad, they have been bad a long time and they are getting worse, and it is time to act.

The state says, your Honor, there is no evidence that accelerating correction will actually benefit things. I would

direct the Court's attention to one exhibit, AT-095, prepared by the very program of the Department of Fisheries that fixes culverts, the SHEAR program -- that used to fix culverts. What it says is, "The benefits are directly proportional to the number corrected each year." That is not rocket science. And it is in there.

I am not going to try to do the math. I suppose I could, but if your Honor will do the arithmetic, him or herself, with regard to the number of culverts fixed, 225 tried by the state, a number of them that are not successful, 176 left, and that's since 1991. Do the math. It works out to about six and a half a year. And we have over a century still to go.

So absent questions from the Court, that's all I wanted to say at the moment.

THE COURT: Thank you, Mr. Sledd. Counsel, I know we have another argument scheduled for this afternoon, another sub-proceeding here, another issue that has come up regarding the halibut fishery. There is no doubt, I think, that all parties to this case wish for the same end result, more salmon in the future. The disagreement obviously is how to get there.

There is also no doubt this case highlights just how complex the problem is. And perhaps more accurately stated, how complex the solution may be. And here we are only talking about culverts and one of the Hs of the four Hs that all of the experts discussed. And, of course, I am only referring to the factual

issues, not the myriad of legal issues that arise when a court is asked to basically impose an extraordinary remedy, which is injunctive relief, ordering the state to take specific actions within a very specific time.

I think everyone who ever practices in court understands that litigation always has inherent built-in limitations. And cooperative collaborative effort by all stakeholders always makes greater sense. However, sometimes there is no other resort, and that's when courts must step in, albeit reluctantly, when we do so.

There has been a lot of evidence produced in this particular case, a lot of material for the Court to consider, and I will take a careful look at it. I will try to get you a ruling as quickly as we can. Thank you all very much. We will be in recess.

(At this time a short break was taken.)

(Sub-proceeding 91-1)

THE CLERK: We are back on the record in sub-proceeding 91-1. Will counsel please make their appearances for the record?

MS. RASMUSSEN: May it please the Court, my name is Lauren Rasmussen for the Jamestown Clallam Tribe.

THE COURT: Now you are all by yourself over there.

MS. RASMUSSEN: There isn't co-counsel here.

MR. BERLEY: Your Honor, Richard Berley for the Makah Tribe. With me is Brian Gruber.

MR. RAAS: Good afternoon to the Court. Dan Raas from the Lummi Nation. With me is Ms. Mary Neil.

MR. MORISSET: May it please the Court, Mason Morisset for the Tulalip Tribes.

MR. LYON: Good afternoon, your Honor. Kevin Lyon with the Squaxin Island Tribe.

MR. STILTNER: Sam Stiltner with the Puyallup Tribe.

MS. HANSEN: Good afternoon again, your Honor. Michelle Hansen for the Suquamish.

MR. LEWIS: Good afternoon, your Honor. Yale Lewis, co-counsel for the Quileute.

MS. KRUEGER: Good afternoon, your Honor. Katherine Krueger, co-counsel for the Quileute Tribe.

MS. FOSTER: Good afternoon, your Honor. Alix Foster for the Swinomish Indian Tribal Community.

MR. STAY: Hello again, your Honor. Alan Stay for the Muckleshoot Tribe. We are just here observing today.

MR. REICH: Richard Reich with the Muckleshoot Tribe. As Mr. Stay said, we are just observing.

MR. DORSAY: Craig Dorsay for the Hoh Tribe, your Honor.

THE COURT: Anyone else? Ms. Rasmussen, it is your motion.

MS. RASMUSSEN: We are here today to ask this Court to hold the Makah in contempt for its violation of the 2010 halibut management plan. As the Court well knows, this is the third

round of motions before the Court this year, starting off with the Makah's motion to clarify which plan was the status quo, which resulted in your Honor's order clarifying that the 2000 plan was to be the status quo for the fishery, a motion by myself two days before the fishery starts, trying to clarify what indeed it meant to update the plan to current conditions. And I filed this motion because this year the plan, for the first time ever, yielded a 14 or 15-day fishery, when the objective of the plan is a 30-day fishery. And that has never happened before. And this is the first time we have had a plan in recent years that we knew we could have your Honor's help in enforcing.

THE COURT: Ms. Rasmussen, I have a question. You said "the objective." Isn't it just one of the objectives?

MS. RASMUSSEN: Yes, your Honor. I will turn your attention to the 2010 management plan. The plan starts with listing the parties, and then it has the statement objective, singular, to fully harvest the 2010 tribal commercial TAC, which is the total allowable catch allotted to the tribes, while providing a 30-day fishery beginning March 6th.

The structure of the plan has but one sole objective. In order to demand -- request contempt, we must show that both the Makah violated a clear order of the Court and that they failed to take all reasonable steps to comply with the order.

As I said before, the fishery resulted in a 14 or 15-day fishery for the first time ever. And the reason for this is the

Makah opened a second unrestricted fishery on March 20th, 15 days in advance.

Under the provisions for the restricted fishery, which are in front of your Honor, a party can only open a second unrestricted fishery if the catch is radically less. And it says 75,000 pounds. Then the unrestricted fishery may be open for a modest additional period of time.

This year the first 48-hour period of the unrestricted fishery caught 119,000 pounds. It was not radically less than 100,000 -- than 75,000 pounds, and, therefore, the second unrestricted fishery was a violation of the plan.

Now, the Makah, in attempting to avoid this particular provision, tries to characterize the second unrestricted opening as a mop up. They argue that the mop up is a third required sub-fishery of this plan.

But, again, if we go to the plan's provisions, we have a structure. I think of the structure of the plan as -- the objective is the table top and the legs are how the table is going to stay standing. And here we have the mop up fishery, which is allotted essentially whatever is remaining after the unrestricted fishery. The amount allotted to the mop up fishery is 84,000 pounds. It is a management buffer. It is what they use repeatedly in management plans to protect the fishery structure from going over the total allowable catch. They did not allocate all the fish. The unrestricted fishery and the

restricted fishery amounts add up to less than 250,000 pounds. There is 84,000 pounds of protective mechanism in case either of the two fisheries go over.

THE COURT: Counsel, let me ask you a much more basic question. I want to make sure I understand this. What is more important, to harvest the total allowable catch or to fish for 30 days?

MS. RASMUSSEN: In some ways I don't understand your question, because the point of the plan was to fish for 30 days and make the TAC last that long. It is both. If we go back to the reason the S'Klallam brought the sub-proceeding, it is providing a minimum amount of time which would allow parties to get out, gear up for the fishery, find the fish and bring them home. And that's why we negotiated to have this provision be the objective of the plan, which is to provide that minimum opportunity for the small fleets of the S'Klallams to get out there, not be barred by two days of bad weather, actually get out there and get a chance to go fishing.

The reason it is spoken of in terms of opportunity is because my clients firmly believe you have the right to go out and try, but if you don't catch -- You are not guaranteed -- There is no entitlement.

One of the differences of opinion we often have with the Makah is because they have been fishing this fishery for a really long time. It has been going well for them for a really long

time. It has been hard for them to make room for other folks. We don't want to take their share, we just want a chance to fish alongside them. And so we negotiated this plan with this sole objective.

One of the things that gets lost in this interpretation that you see in front of the Court, starting in 2000, what is the status quo, what does status quo mean, so on and so forth, I think its loss is the good faith requirement in the Court's order, the faithfulness to the agreed-upon common purpose and the consistency with the justified expectations of the party.

So when you see the provisions of the plan, and you see that there is one objective, and it is the 30-day fishery, and you see that, okay, you could probably if you had a good lawyer find a way to wiggle out from under this or excuse what you did and open the fishery early. You are not allowed to do that under the restatement second comment A, "Faithfulness to the agreed-upon purpose and consistency with the justified expectations of the parties."

I ask you -- When I look at the plan, and I ask myself the question, what is the common purpose of the 2010 halibut plan, I see one objective. Paragraph 2 of the agreement says, "To fully harvest the TAC while providing the 30-day fishery." And the rest of it is the structure for how we are going to protect the restricted fishery from getting eaten up by the unrestricted fishery, because the unrestricted fishery is fast, hard to

control, everybody goes out and harvests as much as they can in a short period of time. And so all these management limits are intended to protect the restricted fishery from getting eaten up from the competing demands of the unrestricted fishery and provide this important opportunity for the smaller fleet.

This case was not brought by Makah to protect their unrestricted fishery. This case was brought by the S'Klallam to protect their opportunity to get out there and not be cut off, or preempted, or have the fishery closed before their single boat gets out on the water.

I come back to that because, in the discussions that occurred this year, there was this movement to try to manipulate the plan, but there was nobody who said, you know what -- Actually there was one person. There was one person that said -- when there was an argument about the plan and how it should be interpreted, somebody said, you know, I shouldn't have to look to a declaration to know what the plan means. I should be able to look at the plan and know what I'm supposed to do and what I am not supposed to do. And when I look at the plan, it is very clear to me that you cannot -- that April 5th is not March 20th.

And when you were faced with that problem, that you reached the range of the restricted fishing early -- In fact, the evidence before you is that all the parties went over the range of the restricted fishery by 16,000 pounds before anybody closed. You couldn't just do your own thing. You couldn't just go out

there and open the second unrestricted early without the consensus of everybody else.

And this is the same problem that has happened for years in this fishery. I think it comes from a feeling of entitlement. I am not here to psychoanalyze everybody, but when you come into the fishery and you think you can manage it without everybody's consensus -- You see the 2009 objection that the S'Klallam made to the Makah. We said, hey, you can't do that. The 2000 plan was really the last one that was adopted by consensus. You see the letter back from Brian Gruber, no, we have seven of the 13 participating tribes; we can go forward without you; you are de minimus. That is the attitude that permeated last year. It is permeating the interpretations this year, which is, if we can get a few people to go along with us, people that find this fishery beneficial to them, or for whatever reason adhere to this particular interpretation of the plan, then that's okay. And it is not okay.

When I come back to the plan itself, even under the Makah's interpretation, where it tries to characterize this opening as a mop up, you will see the provision I underlined. It says the mop up cannot even be discussed until April 5th, which is the end of the 30-day restricted. At that point, you are supposed to discuss management options and agree to a management plan for the remaining portion of the tribal commercial TAC. So even when you open a mop up, you have to have agreement. You can't just go do

your own thing.

This language also further counters Makah's argument that the mop up is a required third sub-fishery that should be allowed to frustrate the objective of the plan, that protecting this 84,000 pounds should be equal to protecting the 30 days.

If you read the plan consistent with the common purpose, you really have to let -- you would be letting the whole plan be frustrated by your interpretation. And I believe under the law you are not allowed to do that. You are not allowed to do that. And when they opened the fishery on March 20th, it was a violation of the plan.

Now, there is a couple of reasons they have given for why they had to open the unrestricted fishery. They don't deny they opened the unrestricted fishery on March 20th. They don't deny at that point we had been way into the restricted catch. They say the reason they had to open this fishery early -- These are their reasonable steps they took to comply. One was the issue that we have addressed already, that the mop up is a required third sub-fishery. You see they tried to get away from the terminology mop up and called it a sub-fishery, because mop up is the management buffer. It is harvesting whatever remains.

They say that we elevated the restricted fishery to the objective. We didn't elevate it, the plan elevates it. It is the 30 days. Everything turns around that 30 days in trying to hold it up.

They say they had to open the unrestricted fishery because we continued on March 17th to fish on March 18th and March 19th, and then they all reopened again an unrestricted fishery on March 20th.

So, again, we were fishing with management limits.

This is the do-as-I-say-not-as-I-do defense. They harvested themselves way into that expected range. We were 16,000 pounds over when they said, well, now we don't want to do that anymore; we want to do the unrestricted fishery, and we want to take whatever is left and just go fishing. That is not proper. That is not a correct interpretation of the plan. Again, consistent with the agreed-upon common purpose and the justified expectations of the party.

The S'Klallam and the S'Klallam fishermen, whose declarations I put before you, had justified expectations that 30 days meant 30 days. If there is some way this plan can be interpreted so 30 days doesn't mean 30 days, then we have a problem. To me and to the fishermen, that doesn't seem right.

Now, the last thing that they come forward with, and they may have something else to say after I sit down, is, look, your Honor, we made this proposal, we made this 250-pound per fisher with two landings per week proposal. The S'Klallam, they ignored us. They weren't really willing to manage this restricted fishery.

I want it to be crystal clear, that a 250-pound limit with

two landings per week is a two-weekday per week fishery. A landing is when the boat comes into the dock. And the small boats come into the dock every day.

It is like giving somebody a job for a month and having them come in for two days. And you say, well, I am not in breach of your contract because I gave you work on the first day of the month and I gave you work on the last day of the month, and, therefore, I employed you for a month. Well, that is not -- that wouldn't be 30 days of employment, and this is not 30 days of fishing that their proposal was meant to achieve. Their proposal was meant to reduce the fishery to essentially two days. And it wasn't a reasonable proposal and attempt to achieve the common purpose.

I respectfully request that, although it is an extraordinary measure, this Court hold the Makah accountable. Any other lack of clear response to a violation of an order, even if it is just for one more year, is a win. If anything less than saying, you know, it is not okay to do this, this is a wrong on the S'Klallam, and the S'Klallam came before this Court and we asked, please don't let this plan be breached, please protect us. Perhaps it wasn't right, perhaps it hadn't happened yet, perhaps it was convincing that our claims were hypothetical and there was a lack of support. But we tried. We tried to stop it. And nobody wanted to do anything.

We ask this Court to take clear guidance, to enforce the

plan, and really get back to what the court said in sub-proceeding 80-1, which is, between sovereigns it is especially important to enforce their obligations.

As the Suquamish just filed in their joint status report, there is 360-day, by their count, and I haven't counted myself, types of agreements filed with the Court. And if you don't require parties to adhere to the plans and fulfill the justified expectations of the parties, then a wrong is committed. Thank you.

THE COURT: Counsel, before you step down, let me ask you a couple of questions. I am having a little bit of a problem understanding this. You have X amount of fish, you have Y amount of fishermen, in terms of your plan and your proposal. And I understand fully well from reading your materials how important it is to your clients to have that 30-day period of time to go out there and fish. Is there no room for adjustment if the amount allocated to the fishery is reached sooner than the 30 days? What if there is one halibut out there?

MS. RASMUSSEN: If there is one halibut out there, then obviously we can't fish for 30 days. We don't have one halibut, we have 251,000 halibut. In 2000, when this plan was adopted, there was 300,000 halibut. And we got 60 days out of the fishery, from just the restricted fishery alone.

I don't know if we are at the point yet where we can surmise what we would do if the catch dwindled to a small fraction of

what it is today. But right now, there is a way to get 30 days out of the 250,000 pounds. And we didn't get it because of the illegal, unrestricted, free-for-all fishery that was opened instead.

THE COURT: But if everybody has scaled down their catch limit per day, wouldn't that give you your 30 days?

MS. RASMUSSEN: I guess I am not understanding what you are proposing.

THE COURT: Again, we get back to this so many fish, so many fishermen, right?

MS. RASMUSSEN: Yes.

THE COURT: So once you determine how many fish there are, then you can figure out how many can be caught per day by fishermen.

MS. RASMUSSEN: Yes.

THE COURT: So if you scaled down the amount of fish you are allowed to catch per day in an agreement, that would give you your 30 days to fish, correct?

MS. RASMUSSEN: Yes. Where the difference of opinion lies is how many fish we have to work with. Under the Makah interpretation of the plan, the expected catch range is a hard cap at 48,000 pounds. Therefore, the management buffer, in their view, is only to be used to buffer the unrestricted fishery, it is not to be used to buffer the restricted fishery. That is where the rubber hits the pavement. That's where their

interpretation of the plan is being used to destroy the common purpose.

THE COURT: All right. What about the Makah's assertion that the S'Klallam Tribes had their best catch ever? Jamestown S'Klallam, best catch in 20 years for Port Gamble.

MS. RASMUSSEN: It is a nice fact, but it is not relevant to the question of whether the Makah violated the plan. They would have had an even better year if they had gotten their 30 days that was promised to them. When you and I have a contract, just because I happen to make a lot of money somewhere else or do well, that is not the relevant point. The point is the promise. The promise would have gotten my clients a whole lot more than they did get.

And the 30-day opportunity is interesting to folks in the fishery -- I provided some declarations of fishermen that said -- The Port Gamble fishermen are actually going to get out there for the first time in a long time. The thing that has been holding them back is just knowing that they can get out there. And also, you know, being squeezed in other fisheries. Not to argue the culvert case while folks are gone, but being squeezed in the other fisheries puts more pressure between tribes.

A lot of folks don't like to have intertribal disputes. And I don't like them either. But when you are squeezed on all levels, and then you are sharing the 250,000 pounds, there is going to be tensions. And we would love to be able to resolve

these tensions, but the culture of this fishery has been this era of entitlement and tyranny of the majority.

THE COURT: Thanks, Ms. Rasmussen.

MR. BERLEY: Good afternoon, your Honor. I am Richard Berley for the Makah. We do have the chairman of the tribe here, Michael Lawrence. We have several elected officials of the tribe here, councilmen. We have the fisheries director of the Makah Tribe here. There are a lot of people that are interested.

As you have heard, your Honor, we have a tremendous difference of opinion with the S'Klallams about the meaning of the 2000 plan. It is not just Makah. Most of the halibut tribes have a tremendous difference of opinion about the interpretation of the plan.

We have a court opinion in this case from 2001 which interprets this plan. And it is at odds with the S'Klallam's interpretation of the case. It is the law of the case, and the S'Klallam don't even mention it.

The 2000 plan itself calls for three sub-fisheries. It is very clear on this point. It doesn't emphasize one over the other. Each sub-fishery has an associated sub-quota. All three are important in different ways to different tribes. All three must be protected.

The Court's 2001 order by Judge Rothstein provides the clearest explanation of the purposes and administration of the plan. And it is inconsistent with the S'Klallam's position.

The S'Klallams look at one term of one sub-fishery and say it trumps everything else. They ignore the other two sub-fisheries. And even as to the restricted sub-fishery, the one they care about, they ignore all other terms, as you have heard just now, except for the 30-day time period within which the restricted fishery is supposed to be managed. But the restricted sub-fishery does have a sub-quota, and it has to be managed for it. The only way to manage for it is through cooperation among the tribes. And the plan explicitly calls for that.

The S'Klallams have tried to change the restricted fishery sub-quota in their last motion to clarify. They failed to do that. The restricted fishery sub-quota remains at 15 to 20 percent -- 15 to 19 percent, in that range. That sub-quota was taken. The restricted sub-fishery took its full sub-quota in less than 30 days this year. It took it in 15 days.

For the restricted fishery to last 30 days, you have to manage for it. You have to take management measures. The main one that is set forth in the plan is to reduce the daily vessel trip limits. 500 pounds per vessel per day just won't work with a low TAC year. The tribes can, they did, and they predictably will take 11- to 12,000 pounds per day in the restricted fishery in good weather.

The Makah and others pointed out in intertribal meetings, both before and during the fishery, if the restricted sub-fishery would be maintained within its quota, there would have to be

management measures, and there would have to be reductions to the trip limits in this fishery. The S'Klallams rejected any reductions whatsoever, until the restricted sub-quota was overtaken. The high end of the restricted sub-quota range was 48,000, and they rejected any reduction in the daily vessel trip limit until the catch was at least 61,000, and probably more, because fish came in, and were reported several days later.

In the Makah's view, the S'Klallams violated the plan. They violated the plan by continuing to fish after the restricted sub-quota was taken, and they violated the plan by refusing to agree to vessel trip limits as required by the plan to protect the 30-day sub-fishery. They failed to cooperate, in other words. Cooperation is necessary -- is a necessary element to this plan.

The S'Klallams argument that the 30-day term trumps everything else in the plan, including that fishery's own sub-quota, has no basis in the plan itself. It has no basis in how the fishery was managed between 2000 and 2003, when the 2000 plan was in effect, or in any court order interpreting the plan. Their position was rejected.

Once the Court's minute order came out on March 5th, it was clear that the only adjustments to the 2000 plan were in the international opening date and in the total quota for the entire fishery. The 2000 plan's sub-quota formulas were maintained and the 2000 plan's requirement of continued cooperation so the

restricted sub-fishery could be open for 30 days was also maintained.

Now, this tyranny of the majority, that is an interesting way to put it. Unlike the S'Klallams, the Makahs actually tried to work with other tribes. Unlike the S'Klallams, the Makahs did not work alone. They worked diligently with other tribes. It tried to forge a consensus. It tried to make something work. It proposed management reductions to protect the 30 days. The S'Klallams would not move an inch. They wouldn't close their restricted fishery when it was taken, they just kept fishing, even after the sub-quota was taken. They wouldn't even stop fishing so the tribes could come to court.

The Makah didn't act unilaterally. The other tribes can speak for themselves, but they viewed the S'Klallam position at the time as outrageous as well. Seven tribes viewed it that way and decided to open a 12-hour unrestricted opening as part of the third fishery.

In hindsight, the Makah was most successful, so now the S'Klallam are trying as a tactic to isolate the late Makah. But the Makahs actually worked with other tribes, and the S'Kallams did not. It is mandatory under the plan to work with the other tribes.

The S'Klallams characterize themselves as having a small fishery. They had an all-time success this year by any measure. They have never pointed it out. It was the coastal tribes that

were hurt this year. The Makah was hurt. The Quinault were hurt. The Quileute were hurt.

In our view, the S'Klallams have had some success distorting the fishery. They succeeded in getting out of their 2004 and 2006 agreements. They persuaded the Court that the 2000 plan was the status quo. But the 2000 plan, when it was in effect, between 2000 and 2003, wasn't particularly good for the S'Klallams. They didn't do well under it. So immediately after getting the 2000 plan adopted as the status quo, they tried to change it. They tried to change the sub-quotas under the plan. The Court rejected this, this bootstrapping, in its March 5th minute order, but the S'Klallam continue to reject those sub-quotas, and they reject them today. They continue to ignore or reject every feature of the plan that isn't convenient for them.

We think that the S'Klallam have misinterpreted and violated the plan. At a minimum, it is obvious from the lengthy declarations that there was a serious disagreement about interpreting the 2000 plan, even after the Court's minute order.

At most, giving the S'Klallams' argument more credit than we think they deserve, it can be argued that the plan doesn't explicitly address what happens if the full restricted sub-quota is taken in less than 30 days.

This ambiguity in the plan, if that's what it is, was not resolved by the Court's minute order. And the S'Klallam

explicitly acknowledge this in their briefing in footnote 3 of their reply. And this fact alone is enough to defeat their motion.

The legal standard for contempt is very high. We haven't really heard that standard from the S'Klallam. It is a drastic remedy. It has never been imposed in this case in any intertribal disputes. And we have been having intertribal disputes for almost the 40-year history of this case. The S'Klallam barely articulate that standard. They must show by clear and convincing evidence that the Makah clearly, specifically, unequivocally violated a court order. There is nothing remotely like that here.

Unfortunately, we don't have a particularly specific decree here. Specificity is required if the punishment of contempt is going to be imposed. A disagreement about the meaning of a decree is not contempt. There can't be contempt if there is a good faith effort to comply with the Court's decree, which the Makah tried to do in this case.

There were some other incorrect statements made by the S'Klallams. First, there was no way this fishery was going to last another 15 days if the people did what the S'Klallams wanted to do. The numbers they put out are based on them fishing by themselves.

If they went out to fish, and if -- No one else was going to remain in port. Everyone was going to come out. And if the

reduction from 500 pounds to 350, after the full sub-quota of the restricted fishery was already taken, it would have done nothing to protect the TAC. The average take per vessel per day in the landings in the restricted fishery -- in the landing zone restricted fishery were approximately 250 to 300 pounds a day. So it was meaningless. Other tribes would have gone out and fished out the rest of the quota in a few days anyway.

The majority of the tribes, after consultation, including consultation with the S'Klallam, after the S'Klallam refused to close their fishery, scheduled a 12-hour unrestricted opening, because the continuation of the restricted fishery after their sub-quota was taken threatened to preempt the rest of the fishery. The tribes were concerned that continuing to allow fishing along that line would preempt the third sub-fishery completely.

The 2010 TAC was slow. That made for a rough year, a difficult year for the halibut tribes to manage. But difficulty managing a fishery isn't contempt.

We have a minute order here that obviously doesn't answer all the questions about how to interpret the 2000 plan. The tribes may need additional guidance. The tribes may have to try to renegotiate a management plan that is easier to manage with the help of a settlement judge, as your Honor suggested in your last order. But these issues should be addressed in a proceeding where all the tribes can participate fully and not in a contempt

proceeding like this.

We respectfully ask that the motion be denied.

THE COURT: Thank you. Ms. Rasmussen, anything further?

MS. RASMUSSEN: There is always wiggle room. There is always going to be the opportunity to come to this Court and say, well, gee whiz, your Honor, I couldn't figure out how to comply, we were stuck, we did what we thought was reasonable. March 20th is not April 5th, 15 days is not 30. The good faith interpretation of the plan required the parties to sit down before the start of the fishery, as the S'Klallam urged in their letter and their e-mail, and try to figure out how to make it work. Coming in 14 days into the fishery and saying, oh, too bad, so sad, you can't get your 30 days, is not compliance with the plan.

If you look at all the years that the plan was in place, you will see that never was the plan ever this short. Never did it close prior to the 30 days. Never was it interpreted the expected catch range for the restricted fishery as a hard cap could be used to frustrate the purposes of the plan.

And all the other things that the Makah argues have to do with that difference of opinion: Are you allowed to do that? Are you allowed to say that the unrestricted fishery can fully and freely use the management buffer, but the restricted fishery is not allowed to do so, even though it is the unrestricted fishery that has the language that says it shall be managed to

not exceed this amount? Again, interpretation with the goal -- the common purpose of the plan would require no more attempts to game the system.

It is really hard to sit here and hear about how the Makah tried to achieve consensus, when on a repeated basis -- in 2009, you see it in black and white, seven out of 13 tribes is good enough, has been the permeating attitude in this fishery based on the entitlement.

Normally I would say a good faith proposal to enter into settlement discussions would be a wonderful thing. But often what has been happening is it is the party that wants to continue to do what it is doing, that wants to propose further settlement discussion as a way to avoiding the repercussions of their actions. And any wiggle room or equivocation on enforcing the terms of the plan, even if you were to choose to enforce it against us, your Honor, would be unacceptable. The parties need to get the clear message that just because a bunch of people agree with you does not relieve you of your obligations.

We ask this Court to hold the Makah in contempt and to enforce the provisions of the plan.

THE COURT: Thank you, counsel. The motion before the Court is a request the Court hold the Makah in contempt, order them to pay reasonable attorney fees necessary to bring this action and any other just and equitable relief.

After reading through all of this, there is no doubt in my

mind there is a serious disagreement with the interpretation and implementation of this plan. Whether it does have built-in ambiguity or not, it is obvious that nobody agrees exactly what it means.

There are only so many fish out there, there are so many fishermen. There are different parts to the agreement, the restricted fishery, the unrestricted fishery, the mop up, the 30-day plan. All of those parts are important, in my opinion. But I do agree that the only way to manage this is through the cooperation of all the tribes. That is why the Court has set up a process for everyone to get together and, if necessary, with the help of a judge, and iron out all of these issues.

In terms of the actual motion before the Court today, the legal standard for contempt has not been met here. Procedurally there are severe hurdles in the way, as pointed out by Mr. Raas's brief. On the merits, there are issues that prohibit the Court from reaching that conclusion as well.

It is obvious that everyone is frustrated, and I urge all of you to think about how we handle this before the next season comes up.

For now, the motion holding the Makah in contempt will be denied. All parties will bear their own costs. Thank you. We will be at recess.

(Adjourned.)

CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

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Barry L. Fanning